

16. THE PRIORITIES, THE VALUES, THE PUBLIC.

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1. Introduction

Previous chapters have given insights into a selection of the public domain's many faces. We have had discussions on historical development (Grosheide);¹ ideas as to how we might visualise the boundaries between public and private spaces (Deazley);² questions raised as to whether there is any right to the public domain (Cahir);³ examination of the public domain in the international sphere (Taubman);⁴ analysis of the interaction between the public domain and the public interest (Davies);⁵ discussion on categories of intellectual space (Macmillan);⁶ of making space (Howkins);⁷ of constructing space (Bainton)⁸ and of using space (Thompson);⁹ debates over the development of public spaces within a privatised system (La Manna,¹⁰ Susskind¹¹); of particular spaces (Gibson);¹² concerns voiced over the diminution of public spaces (Wallace and Mayer);¹³

¹ Grosheide, F.W. 'In Search of the Public Domain during the Prehistory of Copyright Law', Chapter 1 (hereafter Grosheide).

² Deazley, R. 'Copyright's Public Domain', Chapter 2 (hereafter Deazley).

³ Cahir, J. 'The Public Domain: Right or Liberty?', Chapter 3 (hereafter Cahir).

⁴ Taubman, A. 'The Public Domain and International Intellectual Property Lay Treaties', Chapter 4 (hereafter Taubman).

⁵ Davies, G. 'The Public Domain and the Public Interest', Chapter 5 (hereafter Davies).

⁶ Macmillan, F. 'Altering the Contours of the Public Domain', Chapter 6 (hereafter Macmillan).

⁷ Howkins, J. 'Creativity, Innovation and Intellectual Property: A New Approach for the 21st Century', Chapter 7 (hereafter Howkins).

⁸ Bainton, T. 'The Public Domain and the Librarian', Chapter 8 (hereafter Bainton).

⁹ Thompson, B. 'The Public Domain and the Creative Author', Chapter 9 (hereafter Thompson).

¹⁰ La Manna, M.M.A. 'The Public Domain and the Economist', Chapter 10 (hereafter La Manna).

¹¹ Susskind, R. 'The Public Domain and Public Sector Information', Chapter 11 (hereafter Susskind).

¹² Gibson, J. 'Audiences in Tradition: Traditional Knowledge and the Public Domain', Chapter 12 (hereafter Gibson).

¹³ Wallace, H. & Mayer, S. 'Scientific Research Agendas: Controlled and Shaped by the Scope of Patentability', Chapter 13 (hereafter Wallace and Mayer).

and varied views of the public (Bruce).¹⁴ Finally it has been asked whether we really need rights at all (Dutfield),¹⁵ or whether all spaces should be public.

Critically during these discussions not one author has called for doing away of the property rights within intellectual property, not even when challenged to think of a rights-free world.¹⁶ But the majority do seem dissatisfied with the process of determining the boundaries between the public and the private and the consequent impact within the field. The reader has been invited to think about how the boundaries are or might be conceived, how the various spaces might relate to each other, and how and why any changes might be effected.

The purpose of this chapter is to draw together a number of the themes that have emerged. It is in particular to question where and how values (drawing on the discussion by Bruce¹⁷) that we place within the policy of intellectual property and the intellectual property system are incorporated, and to suggest that if intellectual property touches the majority of the public, it is for the public to debate the values they would like to see reflected in the priorities set by the policy process.¹⁸ It will be suggested that the categorisation discussed by Macmillan¹⁹ might be a most useful starting point, albeit that in order to engage the public the terminology might have to be changed and contemporised. The question to be addressed is thus: how can the public be engaged in determining the values which should be reflected in the priorities within the intellectual property system?

2. The Process

¹⁴ Bruce, A. 'The Public Domain: Ideology vs. Interest', Chapter 14 (hereafter Bruce).

¹⁵ Dutfield, G. 'A Rights-Free World – Is it Workable, and What is the Point?' Chapter 15 (hereafter Dutfield).

¹⁶ Dutfield pX

¹⁷ Bruce p Y

¹⁸ Taubman p y.

¹⁹ Macmillan pX

The intellectual property development process is relentless. Whether at international European or domestic level not a day passes without a judgement from a court,²⁰ a policy proposal, the announcement of an investigation into current practices,²¹ a legislative enactment, the publication of a commentary,²² or a set of principles,²³ or any manner of other communication that comments on, challenges, alters or in some way impacts upon the intellectual property construct. A casual observer may easily conclude that these initiatives seem piecemeal, reactive, lacking in clear or even articulated rationales, and based on interest claims and counter-claims rather than values held by the public.²⁴ Nonetheless this activity has an impact, sometimes profound, on the spaces within the intellectual property sector domestically, regionally and internationally.

²⁰ Prince Charles recently won his case for summary judgement against The Mail on Sunday to restrain the newspaper from printing further extracts from one of his diaries, but the matter of other diaries was left over for a full trial (HRH Prince of Wales v Associated Newspapers Ltd. [2006] EWHC 522 (Ch)). And so the boundary between confidentiality, freedom of expression, copyright, fair dealing, publication and the public interest has shifted. For an indication of how regularly intellectual property cases are referred to the ECJ, see www.patent.gov.uk/about/ippd/ecj/index.htm.

²¹ For a list of recent and current UK and European consultations in the IP sphere see www.patent.gov.uk/about/consultations/writtenconsult.htm

²² A glance at the following list illustrates how prolific the contributors to this book are. Deazley, R. (2004), *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* Oxford: Hart Publishing; Cahir, J. (2004), 'The withering away of property: the rise of the internet information commons'. *Oxford Journal of Legal Studies* 24(4), 619-641; Grosheide, W. & Brinkhof, J. (eds.) (2005), *Intellectual Property Law: crossing borders between traditional and actual*, Molengrafica Series: Intersentia; Taubman, A. (2005), 'Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge', *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* Maskus, K. & Reichman, J. (eds.) Cambridge: Cambridge University Press, 521-564; Macmillan, F. (ed.) (2006), *New Directions in Copyright Law*, Vol. 2, Cheltenham, UK, Northampton, MA, USA: Edward Elgar; Howkins, J. (2002), *The Creative Economy: How People Make Money from Ideas*, London: Penguin Books Ltd.; For Toby Bainton's work in the library field see www.sconul.ac.uk/; and for Bill Thompson's Weblog and links to his work see www.andfinally.com/index.html and www.thebillblog.com. See also La Manna, M. and Bennett, J. (2001), 'Reversing The Keynesian Asymmetry', *American Economic Review*, Vol. 91(5), 1556-63; Susskind, R. (1998), *The Future of Law: Facing the Challenges of Information Technology*, Oxford: Oxford University Press; Gibson, J. (2005), *Community Resources: Intellectual Property International Trade and Protection of Traditional Knowledge*. Aldershot: Ashgate; Wallace, A. (2003), *UK Biobank: Good for Public Health? Open Democracy 2003* at www.opendemocracy.net/theme_9-genes/article_1381.jsp; Mayer, S. and Stirling, A. *GM Crops: Good or Bad? Those Who Choose the Questions Determine the Answers EMBO Reports Vol 5, No 11, (2004)*; Bruce, A. & Tait, J. (2004) 'Interests, Values and Genetic Databases in Blood and Data - Ethical, Legal and Social Aspects of Human Genetic Databases', in Arnason, A., Nordal, S. and Arnason, V. (eds.) *ELSAGEN Conference, University of Iceland, Reykjavik, 25-28*; Dutfield, G. (2004), *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, Earthscan Publications Ltd.,

²³ Howkins (Chapter X) has discussed the Adelphi Charter. At a recent expert meeting hosted by the AHRC Research Centre for Studies in Intellectual Property and Technology Law on comparative approaches to the protection to personality, it was agreed that a set of Principles for the Protection of Personality should be developed. For details of the project see www.law.ed.ac.uk/ahrb/personality/

²⁴ Others would of course argue that they are the result of the democratic process. Cahir p X

A survey of some of the recent developments in the intellectual property sphere (some of which have been touched upon by other contributors to this collection) serves to highlight the piecemeal approach to intellectual property development and illustrates just some of the tensions that underlie this ad hoc reform.

3. Making Policy

A starting point might be to consider the process through which policy making is crafted in today's climate. As Taubman says:

The policymaker's task is ... to craft the optimal dynamic interplay between public domains and forms of legal exclusion, so as to optimise the production of those public goods which the policy process sets as its priorities.²⁵

The process for crafting this dynamic interplay is well documented, at least as regards what happens at international level. A body of literature exists, giving insightful analysis of the ways in which powers and interests negotiate in the development of treaties and other international agreements, and cataloguing the relationships between policy-makers and others as priorities ebb and flow, through which the boundaries between the public and the private are wrought.²⁶ Less commented upon, at least with the level of intensity of the studies at international level, is how regional and domestic legislation is formulated to optimise the production of public goods.²⁷ That the process is at least nominally 'open' to participation by anyone who might have an interest is without question. Calls for evidence, discussions on proposals, policy papers, and other initiatives bombard the

²⁵ Taubman p X

²⁶ Braithwaite, J. & Drabos, P. (2000), *Global Business Regulation*, Cambridge: Cambridge University Press; Drabos, P. & Braithwaite, J. (2002), *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan Publications Ltd; Sell, S. (2003), *Private Power, Public Law: The Globalization of Intellectual Property Rights* Cambridge: Cambridge University Press.

²⁷ Litman, J. (2001), *Digital Copyright* Prometheus Books.

intellectual property interest.²⁸ But whether this process achieves the results we might wish, or whether it actually reflects what many might like, is a moot point. The process that allows voices to be heard engages the public, but seldom, it would seem, at the point at which the policy priorities are set. Instead comment is invited once initiatives appear not to be operating in the way anticipated. In addition, public consultation is not an end in itself (one would not expect it to be), but merely a pause for further reflection by the policy-makers intent on pursuing elusive priorities.

3.1. Policy-makers at work – how do they craft the optimal dynamic interplay?

One example can be given from the Commission on Intellectual Property Rights.²⁹ This body was established in 2001 as a result of a recommendation made in the UK Government's White Paper on International Development, 'Eliminating World Poverty: Making Globalisation Work for the Poor'.³⁰ The Commission was specifically asked to look at the intellectual property rights interface between developed and developing countries and how it could be designed to benefit developing countries. As was highlighted in the introduction to the final report published in 2002:

When there is so much uncertainty and controversy about the global impact of IPRs, we believe it is incumbent on policy makers to consider the available evidence, imperfect as it may be, before further extending property rights in scope or territorial extent.³¹

²⁸ I have no fewer than six sitting in my email inbox at the time of writing. And as I wrote another dropped into my email box accompanied by a rather anguished note from the secretary to the relevant committee: 'YET ANOTHER CONSULTATION PAPER'. Yes, the note was in capitals.

²⁹ For general information on the Commission on Intellectual Property Rights (hereafter CIPR) see www.iprcommission.org.

³⁰ Government's White Paper on International Development 'Eliminating World Poverty: Making Globalisation Work for the Poor'. Cm 5006.

³¹ CIPR Final Report: Integrating Intellectual Property Rights and Development Policy, London, 7. Available at www.iprcommission.org/home.html.

The report also acknowledged the imbalance that can occur in this process:

Too often the interests of the ‘producer’ dominate in the evolution of IP policy, and that of the ultimate consumer is neither heard nor heeded. So policy tends to be determined more by the interests of the commercial users of the system, than by an impartial conception of the greater public good.³²

But even when expression of these interests gathered through an investigative process such as that used by the CIPR might be considered to be representative of those that should be heard, there is no guarantee that what is called for will be acted upon. In one recommendation the CIPR called for commitments to ensure open access to scientific databases. In response the Government agreed ‘that the results of publicly-funded research should as a general rule be made publicly available...’³³

Now there might have been a failing by the CIPR to define precisely what was meant by ‘open access’;³⁴ but the results since the report probably fall far short of what the Commission, and indeed those who were consulted, had in mind. Although the CIPR was directed specifically towards developing countries, even within the UK there is no clear policy as to the availability or otherwise, or at what price, of the contents of scientific databases. This is a theme that is reflected in Susskind’s contribution to the present collection. As he explains, the Re-use of Public Sector Information Regulations 2005³⁵ are intended to free up public sector information and make it available for re-use to the community. However, this initiative is set within a melee of governmental policies pulling in contrary directions.³⁶ Some publicly funded collators of public sector

³² Ibid.

³³ Ibid p 4 point 5.

³⁴ Open access can have many meanings. For discussion in this collection see La Manna Chapter Y.

³⁵ The Re-use of Public Sector Information Regulations 2005 SI 2005 No. 1515.

³⁶ Susskind p x

information are set up as trading funds and thus need to make a return to the Government.³⁷ In addition, a number of these compete with their private sector counterparts. Whereas their behaviour might be shaped by the shadow of competition law³⁸ and OFT investigations³⁹, the core governmental strategy as played out in the intellectual property field hardly seems consistent, either within the UK, or at the interface with developing countries. The process for crafting the necessary dynamic interplay as it impacts on the intellectual property field seems flawed.

Remaining with the theme of databases, the process which resulted in the Directive for the Legal Protection of Databases⁴⁰ serves graphically to illustrate the relentless machinery of policy-makers intent upon a certain prioritised policy path, but says much less about balanced dynamic interplay.

In 1988 the European Commission published a proposal for a Directive on the protection of databases.⁴¹ In this the Commission observed that copyright might be inadequate for protecting database producers. At a hearing in Brussels in April 1990 interested parties were given the opportunity to express their views. As the Commission itself reported, no support at all emerged for a 'sui generis' approach to protection.⁴² Undeterred, and bolstered by findings in a number of cases from various courts within the EU⁴³ and beyond⁴⁴, holding that fact-based databases were not protected by

³⁷ For example, the Ordnance Survey (www.ordnancesurvey.co.uk).

³⁸ *Attheraces Ltd v British Horse Racing Board* [2005] EWHC 3015 (Ch).

³⁹ The Office of Fair Trading is currently (June 2006) conducting an investigation into the interfaces between public sector bodies and public sector information www.oft.gov.uk/Business/Market+studies/commercial.htm.

⁴⁰ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases (hereafter Database Directive).

⁴¹ Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology. Copyright Issues Requiring Immediate Action, COM (88) 172 final, Brussels, 7 June 1988.

⁴² European Commission, Follow-Up to the Green Paper, COM (90) 584 final, Brussels, 5 December 1990.

⁴³ Supreme Court of the Netherlands 4 January 1991, *Van Dale Lexicografie B.V. v Rudolf Jan Romme*, noted in English in Dommering, E.J. and Hugenholtz P.B. (eds.), (1991), *Protecting Works of Fact*, Deventer/Boston, 93.

⁴⁴ *Feist Publications, Inc. v Rural Telephone Service Co. Inc.* 111 S.Ct. 1282 (1991).

copyright,⁴⁵ the Commission pressed ahead with its idea. In 1992 a further proposal was presented by the Commission to the Council. A common position was adopted in 1995⁴⁶, differing markedly from the original proposal but still containing the *sui generis* right. This was finally accepted by the European Parliament, in 1995.⁴⁷ Along the way, while database-makers became enthused with the idea (who would say no to more protection, however uncertain its boundaries?), the dissenting voices became louder; in particular, those from the scientific domain where the advancement of science depends upon the examination and re-use of information held within databases. How would the measure impact on this sector? No-one was quite sure and so it appears the question was passed over by the policy-makers.

It took nine years and much spilled ink⁴⁸ from the enactment of the measure for it to be emasculated by the European Court of Justice in a series of cases dealing with horseracing and football fixture lists.⁴⁹ Subsequently, in a scheduled but late review of the measure, the Commission acknowledged that the Directive had failed to stimulate investment in the database industry (the *raison d'être* for its existence).⁵⁰ So what should be done? Should the Directive be retained? Who better to consult (as the Commission did) than the players in the database industry? Yes, the measure should be retained. The review, together with the results of the consultation, is currently out for public

⁴⁵ The Commission also drew on figures supplied by publishers detailing the size and importance of the publishing industry.

⁴⁶ Common position adopted by the Council on 10 July 1995, OJ C 288/14.

⁴⁷ OJ C 17 of 22 January 1996.

⁴⁸ Reichman, J.H. and Samuelson, P. (1997), 'Intellectual Property Rights in Data?', 50 *Vanderbilt Law Review* 51; Cornish, W.R. & Llewellyn, D. (2003), *Intellectual Property Rights* London: Sweet & Maxwell 5th ed. para 19.42; Freedman, C.D. (2002), 'Should Canada Enact a New *Sui Generis* Database Right?' 13 *Fordham Intellectual Property Media & Entertainment LJ* 35, Lipton, J. (2003), 'Balancing Private Rights and Public Policies: Reconceptualising Property in Databases', *Berkeley Technology LJ*, 773.

⁴⁹ *British Horseracing Board v William Hill C-203/02* (from the Court of Appeal, England and Wales); *Fixtures Marketing Ltd v Svenska Spel AB C-338/02* (from the Hogsta Domstol, Sweden); *Fixtures Marketing Ltd v OY Veikkaus Ab C-46/02* (from the Vantaan Darajaoikeus, Finland); and *Fixtures Marketing Ltd v Organismoa Prognostikon Agnon Podosfairou (OPAP) C-444/02* (from the Monomeles Protodikio Athinon, Greece); [2004] ECR I-10365, 10415, 10497, 10549.

⁵⁰ First evaluation of Directive 96/9/EC on the legal protection of databases Brussels 12 December 2005.

comment.⁵¹ Is this the most suitable way in which to forge dynamic interplay? Interest and counter interest were expressed during the process. But where and of whom was the deeper and value-laden question asked: why do we want this measure?⁵² There appeared to be limited public engagement in setting the priorities for the policy process

3.2. Responses that were heard

An area in which space was made to hear voices was in relation to the proposal for a Directive on the Patentability of Computer Programs.⁵³ A product of European priorities, the protracted process resulted in a 'No' vote in the European Parliament, and the scrapping of the measure on 6th July 2005. But even here, in the speech acknowledging that this particular proposal would go no further, there were hints that the matter would re-emerge in another guise.⁵⁴ Why? Because without it there will remain inconsistencies in approach to protection as between Member States which are not subject to review by the ECJ. That is certainly a consideration, but is it a factor that should be given much weight in setting policy priorities in the intellectual sphere? If voices were heard at the point of setting the priorities, might the argument have been for less, rather than more protection (e.g. from the point of enactment computer programs could not be patented – more intellectual space). The voices were heard but only once the priorities had been set.

3.3. Will the responses be heard?

Yet another example of public engagement in assessing the impact of already enacted measures is the enquiry into Digital Rights Management (DRM) by the UK All Party

⁵¹ Ibid.

⁵² For a series of similar questions see Howkins p X.

⁵³ Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions COM(2002) 92 final 2002/0047.

⁵⁴ europa.eu.int/comm/internal_market/indprop/comp/index_en.htm

Parliamentary Internet Group (APIG).⁵⁵ Cahir argues that there is no right to the public domain in the common law⁵⁶, and relatedly that deploying DRM to protect content is merely exercising a liberty.⁵⁷ But even here that author acknowledges that there may be room for improving the legislative framework. What effect does DRM and the rules against circumvention have on the spaces within the intellectual property framework? – something presumably the APIG seeks to answer. The legislation, developed during negotiations within WIPO resulting in the WIPO Copyright Treaty, followed by rounds of negotiations at European level when being translated into a Directive⁵⁸ and finally implemented domestically,⁵⁹ has thus already been the subject of an enquiry which seeks to establish how consumers, artists and distribution companies should be protected in a continually evolving market. The consultation was open: over 90 written submissions were received. The Final Report⁶⁰ makes a number of recommendations. Notably for present purposes is the recommendation that the Government consider granting a much wider-ranging exemption to the anti-circumvention measures in the Copyright, Designs and Patents Act 1988 for genuine academic research.⁶¹ One wonders not only whether this will be acted upon – in the limited space the UK legislature might have to do so within its European and International obligations.

4. Values

But this discussion on the process begs a prior question hinted at above, but explicitly raised in the contribution by Bruce. Many of the processes described above are reacting to initiatives and decisions that have already been made somewhere, by someone in

⁵⁵ www.apig.org.uk/current-activities/apig-inquiry-into-digital-rights-management.html.

⁵⁶ Cahir p X.

⁵⁷ Cahir p X.

⁵⁸ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive).

⁵⁹ In the UK implemented in The Copyright and Related Rights Regulations 2003 SI 2003 No. 2498.

⁶⁰ Digital Rights Management: Report of an enquiry by the All Party Internet Group, June 2006. Available at www.apig.org.uk/current-activities/apig-inquiry-into-digital-rights-management/DRMreport.pdf.

⁶¹ Ibid para 65.

response to something. Once those decisions have been made, so the relentless machinery starts, carving out the propertised from the public domain. The rather murky beginning of the Database Directive is a case in point. What or who was driving the original agenda is far from clear.

At what stage are the values, identified by Bruce in relation to the progress of science (what sort of science do we want?),⁶² incorporated into the decision-making process in the sphere of intellectual property? In other words, at what stage can or do we consider what sort of intellectual property system we want (a question also asked by Howkins⁶³)? Where, by whom and according to what evidence are the priorities (the value questions) set in the policy process?⁶⁴

In the domain of science, there has been much concern to engage the public in the setting of the scientific priorities. Why should the public not also be engaged in setting the value priorities for the intellectual property system? It is, after all, a system which touches upon the daily lives of the majority. And if the public should be involved, how then can that be done?

4.1. How can we engage the public in determining the spaces of value in our intellectual property system?

Historical discussion on where and how our current public spaces have developed is vital to our understanding of where and why we are where we are now.⁶⁵ The majority of the authors in this collection have expressed dissatisfaction with the current configuration, so knowing how we arrived where we are is essential if we are not to repeat past mistakes.⁶⁶

⁶² Bruce p x.

⁶³ Howkins p x.

⁶⁴ See Wallace and Mayer chapter 13 for a discussion on the propertisation of science.

⁶⁵ Grosheide Chapter X.

⁶⁶ We must learn from history or we will be 'doomed to repeat it' (George Santayana, 1863-1952).

Armed with this understanding, we can move forward. But if we are to do so on a basis upon which the public can be engaged, and which will engage the public, then perhaps it is the time to develop a different conceptual framework from which to think about reconfiguring our boundaries. Such a reconfiguration is hinted at in the present collection by Taubman⁶⁷ and more fully articulated and developed by Macmillan.⁶⁸ Here there was appeal to Roman law in thinking about spaces as *res communes*, *res publicae*, *res divini juris* and *res universitatis*. Would moving in this direction help to engage the public and give the tools through which the values of the intellectual spaces might be expressed?⁶⁹

4.1.1. *Res communes*

If the ideas-expression dichotomy is valued within the domain of *res communes*, Thompson makes some interesting observations on the resultant parameters of the space. Seeking too much clarity may not be of benefit to the creative author.⁷⁰ But the boundary between property rights and *res communes* is, as Macmillan notes, constantly tested.⁷¹ A high-profile case was recently conducted in the English courts.⁷² The publisher, Random House, was sued over allegations that one of their best-selling authors, Dan Brown, infringed the ‘ideas’ in an earlier book *The Holy Blood and the Holy Grail* by Michael Baigent, Richard Leigh and Henry Lincoln. Now although these issues have been explored in court before,⁷³ some argued that this particular case would serve to

⁶⁷ Taubman p X.

⁶⁸ Macmillan p X. For a different suggested configuration see Howkins p xx.

⁶⁹ Note Taubman argues that there would be a ‘loss of policy context to set these concepts in bare opposition to each other’ as it would lack ‘sufficient inductive basis to guide policymaking overall’ (p x). That is understood. It is not suggested here that the categories be set against one another, but rather that they do or should encompass values through which the public can be engaged and by virtue of which values can be expressed which can in turn be taken into account in setting the priorities.

⁷⁰ Thompson p X.

⁷¹ Macmillan p Y.

⁷² *Baigent and Leigh v The Random House Group Limited* [2006] EWHC 719 (Ch).

⁷³ *Harman Pictures, N. V. v. Osborne and Others* [1967] 1 WLR 723 (Ch); *Ravenscroft v. Herbert and New English Library Limited* [1980] RPC 193 (Ch D).

illuminate a rather murky area. But is this type of forum, where one suspects that money rather than values mattered most, really the most appropriate for deciding on the boundaries between the appropriable and the properly non-appropriable? Granted, any spaces are always going to be tested in court, and parameters will shift as a result. But the more fundamental question is about any public engagement in setting the priorities for these boundaries, which themselves can in turn be fought over. Players in a system which valued greater room for intellectual manoeuvre might not feel so threatened by a case which pushed at the edges. It is only where the room for manoeuvre is so constrained that any clarity which may further erode the freedoms becomes worrisome. Ironies also arise. The publishers (in this case Random House) find themselves aligned with an interest grouping different from the one that they might normally be associated with. In this case they are firmly within the values incorporated by *res communes*. In other scuffles, in particular the open access debate noted below, they are firmly aligned on the property side.

4.1.2. The environment of *res publicae*

There are worthy initiatives which implicate *res publicae*. While *res publicae* in intellectual space refer to the lanes and means of communication,⁷⁴ libraries are concerned with populating this space, as discussed by Bainton in his contribution.⁷⁵ A topical example is that of Google and their Print Library project. Under this initiative Google is scanning materials from Harvard, Stanford, Oxford and Michigan Universities, and the New York Public Library. Users will be able to browse the full text of works on which the term of

⁷⁴ Rose argues that 'the closest analogy to *res publicae* in intellectual space seems to be to the lanes and means of communication, rather than to the content of communication ...' in Rose, C. (2003), 'Romans, Roads, And Romantic Creators: Traditions of Public Property in the Information Age', 66 *Law & Contemporary Problems* 89 (Winter/Spring), 89-110, 104.

⁷⁵ Bainton Chapter X.

copyright has expired.⁷⁶ There are of course fears that works still within the term of copyright will be reproduced either under this or another initiative (Google Book Search). As a result Google has been sued in the US both by authors⁷⁷ and publishers.⁷⁸ Although details of the claims differ, the motivations are the same. At some stage (for those books still within the term of protection) there is infringement of copyright. Google is appealing to *res communes* (fair use) in its defence. Many commentators believe that part of intellectual space is not sufficiently robust to protect Google under these conditions.

Not to be outdone, the European Commission has embarked on an ambitious programme to digitise European libraries.⁷⁹ It is a project 'aimed at making European information resources easier and more interesting to use in an online environment'. The intention is to make at least six million books, documents and other cultural works available to anyone with Internet connection through the European Digital Library.⁸⁰

But here again clashes occur between intellectual property rights and intellectual spaces; accessibility versus ownership. The results of an on-line consultation showed that opinions were sharply divided on copyright issues; in particular between cultural institutions and right-holders.⁸¹ Whereas the right-holders emphasised that present copyright rules were adequate, cultural institutions stressed that change in the present copyright framework is needed for efficient digitisation and digital preservation.

Within Europe the Commission has said that it will address, in a series of policy documents, the issue of the appropriate framework for intellectual property rights

⁷⁶ Google Print Library Project on which more information can be found at print.google.com/googleprint/library.html. See also the contribution by Thompson in this collection.

⁷⁷ *The Authors Guild and others v Google Inc v. Google Inc*. US District Court, New York.

⁷⁸ *The McGraw-Hill Companies, Inc. and others v Google Inc*. 19 October 2005, US District Court, New York.

⁷⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Brussels, 12/2010: Digital Libraries COM(2005) 465 final.

⁸⁰ www.theeuropeanlibrary.org/portal/index.htm.

⁸¹ The results of the consultation can be found at europa.eu.int/information_society/activities/digital_libraries/doc/communication/results_of_online_consultation_en.pdf.

protection in the context of digital libraries.⁸² Will the Commission engage the public in a debate on what priorities they (the public) would like to see represented within these policy documents? Will the public be asked whether intellectual space should be broad enough to encompass these initiatives? Will the public be asked as to what value they would place on these types of spaces and means of communication as compared with, say, the social value underpinning the granting of rights to give the incentive to create more works? Or will the Commission presume to speak on behalf of the public, perhaps on the grounds that the issues are much too complicated to be understood by the lay person?

4.1.3. *Res universitatis*

The open access movement discussed in this collection by La Manna⁸³ is set largely within the university research environment and expresses the values that might most clearly be encompassed by *res universitatis*. Although works are authored and owned (something not necessarily within *res universitatis*⁸⁴), that would appear to matter less to those who populate this space than the ability to make 'freely' available the results of research upon which others may build. It is a movement that has support from the grass roots (those who work within the space) and is one which is nurtured by intermediaries (the research councils who make the funding available for the research, the librarians who support the endeavours).⁸⁵ Much more limited support is given by the legislators.⁸⁶

⁸² Statement at europa.eu.int/information_society/activities/digital_libraries/index_en.htm.

⁸³ La Manna Chapter X.

⁸⁴ Macmillan p X.

⁸⁵ For the position of the Wellcome Trust, funders of medical research, see www.wellcome.ac.uk/doc_WTD002766.html. For slightly less wholehearted support, see Research Councils UK position statement (June 2005) on access to research outputs: 'Where research is funded by the Research Councils and undertaken by researchers with access to an open access e-print repository (institutional or subject-based), Councils will make it a condition for all grants awarded from 1 October 2005 that a copy of all resultant published journal articles or conference proceedings (but not necessarily the underlying data) should be deposited in and/or accessible through that repository, subject to copyright or licensing arrangements'. Available at www.rcuk.ac.uk/access/statement.pdf.

4.1.3.1. Corrective checks in *res universitatis*

The potential negative consequences for the advancement of science in propertising scientific knowledge through patents are highlighted in this collection by Wallace and Meyer, who note with particular concern the conflicting values at the research/commercialisation interface.⁸⁷ How then to free or re-energise the values expressed through *res universitatis* that might be crowded out? As Macmillan has identified, *res universitatis* is not necessarily just made up of spaces that are un-owned, but may also comprise spaces contractually designed to facilitate synergies.⁸⁸ Recognising the strictures that can operate where too much is propertised, the OECD has been investigating the field of licensing of genetic inventions relating to human healthcare, and in particular what effect the granting of patents might have for researchers, firms and clinical users on legal access to genetic inventions.⁸⁹ Although the group found that fewer problems than anticipated were borne out in practice, problems did arise with the numbers and breadth of gene patents when considered alongside the rise of patents with reach-through claims. As a follow-up, the OECD has drafted a series of 'Principles for the licensing of healthcare genetics'.⁹⁰ Noting that research thrives on collaboration and that getting the most out of the genetics revolution will rely increasingly on efficient and effective exchange between those researching and developing new innovations, the guidelines are drafted so as to try and facilitate licensing grounded in economic principles

⁸⁶ See Scientific Publications: Free for All? The Government's Response (available at www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/1200/120002.htm).

⁸⁷ Wallace and Mayer Chapter x.

⁸⁸ Macmillan p X. See also Waelde, C. (2005), 'Creating a contractual research commons: practical experience', in Intellectual Property Law: crossing borders between traditional and actual, Grosheide, F.W. & Brinkhof, J. (eds.) Molengrafica Series, Intersentia 2005, 155-186.

⁸⁹ To explore these issues, the OECD Working Party on Biotechnology held an expert group meeting 'Genetic Inventions, Intellectual Property Rights, and Licensing Practices Evidence and Policies' (2002). Available at www.oecd.org/pdf/M00038000/M00038462.pdf.

⁹⁰ The Principles, 'Licensing genetic information' can be found at www.oecd.org/document/26/0,2340,en_2649_34537_34317658_1_1_1_1,00.html

and the elimination of excessive transactions costs, on a basis which ultimately will serve the interests of society, shareholders and other stakeholders.⁹¹

The juxtaposition of the principles is interesting. Principle 1 B states:

- Licensing practices should encourage the rapid dissemination of information concerning genetic inventions.

Principle 1 C states:

- Licensing practices should provide an opportunity for licensors and licensees to obtain returns from their investment with respect to genetic inventions.

The two are obviously not mutually exclusive, but the priority in this list for rapid dissemination over returns from investment suggests that the values within *res universitatis* are considered more pressing than those of the intellectual property right-holder. An interesting approach from a body comprised of representatives of States committed to a market economy. It is noteworthy that these principles have been developed by policy-makers from those same countries who have developed and expanded intellectual property rights in international, European and domestic fora. One might ask what values policy-makers considered when expanding rights, which they now seek to limit when exercised within the market.

4.1.4. *Res iuris divinis?*

As thinking over the boundaries of intellectual property protection matures, so some begin reconsideration of what might be encompassed within the property right. That deeply held values accruing to some traditional communities may not be most appropriately protected within the existing system is discussed in the present collection

⁹¹ Ibid para 8.

by Gibson.⁹² How then to bring this area within our intellectual spaces, if indeed it should be there at all? Macmillan suggests the domain of *res universitatis*: traditional knowledge can be valued within a bounded community where knowledge is shared by those within.⁹³ But there is surely a problem. *Res universitatis*, as has been discussed, is constantly pressurised by commercial interests and indeed, in some circumstances can survive only in collaboration with these stakeholders. What then of *res iuris divinis*? If the 'Mickey and the Minnies' could be subsumed within this category as examples of contemporary iconography, why not then intangible cultural heritage? Might an advantage be that it represents a space that cannot be owned because of its somehow higher order? Recent efforts by UNESCO, culminating in the Convention for the Safeguarding of the Intangible Cultural Heritage,⁹⁴ suggest a move in this direction.⁹⁵ Rather than extending property rights, the Convention talks of safeguarding, ensuring respect for, and raising awareness of intangible cultural heritage.⁹⁶ To advance these aims of the initiative, UNESCO has over recent years 'proclaimed' a number of cultural masterpieces, chosen for their outstanding historical, artistic and ethnological importance and their value for the cultural identity of the tradition-bearer communities.⁹⁷ The challenge might be to defend these spaces from external commercial incursion. And as Taubman notes, that would depend upon 'the hierarchy of competing public goods within the public policy process'.⁹⁸ But if the ordering took place within a system that had accepted these values, then there may be strength to resist colonisation.

⁹² Gibson p x. See also Taubman p x.

⁹³ Macmillan p X.

⁹⁴ Convention for the Safeguarding of the Intangible Cultural Heritage (hereafter Convention) available at portal.unesco.org/culture/en/ev.php-URL_ID=2225&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁹⁵ See also the discussion by Taubman p X.

⁹⁶ Convention Article 1. Note the signatory states to the Convention.

⁹⁷ The proclaimed Masterpieces can be found at www.unesco.org/culture/masterpieces.

⁹⁸ Taubman p X.

5. Terminology

So can the intellectual spaces debated within this book and other similar initiatives be categorised within *res communes*, *res publicae*, *res universitatis* and *res iuris divini*? The contributions have been offered by a select few. Each however stands within a particular intellectual space populated and used by others. How then to engage the ‘others’ in the discussion of the values that the spaces represent and, relatedly, the priorities that should be pursued in the policy process?

If we are to develop categories from which the free spaces can be defended and engage the public in debate about the values that should be encompassed within these spaces, then there needs not only to be a shared understanding of what might fall into those spaces but in addition the terminology we use needs to be readily understood by those who might wish to engage in the debate. Those of us who are passionate about boundaries and intellectual space should not be so arrogant as to assume that all are interested in engaging in the discussion. But neither should we obfuscate to such an extent that the public are unable to engage.

That there is much work to be done can be simply illustrated. Take the meaning of the terms ‘cultural’ and ‘creative’, central to the creative side of intellectual property but of which there seems to be little shared understanding as to meaning or value in the legal field or beyond.⁹⁹ Several plausible suggestions have been made:

- | | |
|--------------|--|
| Topical: | Culture consists of everything on a list of topics, or categories, such as social organization, religion, or economy |
| Historical: | Culture is social heritage, or tradition, that is passed on to future generations |
| Behavioural: | Culture is shared, learned human behaviour, a way of life |

⁹⁹ See also discussion by Howkins p X.

Normative: Culture is ideals, values, or rules for living

Symbolic: Culture is based on arbitrarily assigned meanings that are shared by a society.¹⁰⁰

But the terminology slips: the economy becomes cultural:

Major study on Europe's cultural economy - Press Release'.¹⁰¹ Currently there is no precise idea of what the economy of culture really means in Europe and what it is worth in socio-economic terms. The Study will help fill these gaps to maximise the development potential of the cultural and creative industry sectors.

And industries become creative:

WIPO establishes the Creative Industries Division. WIPO has recently established the Creative Industries Division. This has been done in response to the growing interest and needs of the Member States of WIPO to address the economic developmental impact that intellectual property policies and practices have on the creative industries. The objective of the Division is to provide a focal point for related policy and industry discourse.¹⁰²

The point is to emphasise that there is no agreed or accepted vocabulary of what it is we value. We need a common starting point from which we can develop a shared set of

¹⁰⁰ Bodley, J. H. (1994), *An Anthropological Perspective. From Cultural Anthropology: Tribes, States, and the Global System*, Mountain View, California, Mayfield.

¹⁰¹ Study on the cultural economy in Europe (EAC/03/05) information available at europa.eu.int/comm/culture/eac/sources_info/studies/studies_en.html.

¹⁰² Information available on the UNESCO website at portal.unesco.org/culture/en/ev.php-URL_ID=29862&URL_DO=DO_TOPIC&URL_SECTION=201.html. For the WIPO site (on which there is less information) see www.wipo.int/sme/en/documents/email_updates/contact_creative_industries_division.htm.

values which can in turn be subject to public debate and from which policy priorities can be developed.

6. Engaging the Public

But even when starting from an agreed vocabulary it might prove difficult to reach shared understandings of or consensus about what it is that should be valued. Bruce explains an example in the scientific domain of the constitution of a committee to discuss values within science and narrates the deadlock that subsequently occurred.¹⁰³ But never let it be said that such an exercise is impossible. Howkins notes a recent initiative, that of drafting the Adelphi Charter.¹⁰⁴ A team of experts representing the public interest joined together to produce a statement of principles the group considered should be reflected in intellectual property law making. Article 9 of the Adelphi Charter provides:

In making decisions about intellectual property law, governments should adhere to these rules:

- There must be an automatic presumption against creating new areas of intellectual property protection, extending existing privileges or extending the duration of rights.
- The burden of proof in such cases must lie on the advocates of change.
- Change must be allowed only if a rigorous analysis clearly demonstrates that it will promote people's basic rights and economic well-being.

¹⁰³ Bruce p X.

¹⁰⁴ Howkins p X.

- Throughout, there should be wide public consultation and a comprehensive, objective and transparent assessment of public benefits and detriments.¹⁰⁵

The public has also been involved in endorsing a call to WIPO - The Geneva Declaration on the Future of WIPO. The plea is that WIPO should consider 'changes of direction, new priorities, and better outcomes for humanity' in setting priorities for the future direction of intellectual property development.¹⁰⁶

Indeed, a thought experiment in a similar vein was carried out by the AHRC Research Centre for Studies in Intellectual Property and Technology Law at the University of Edinburgh in September 2004. Representatives of a number of diverse interest groups (publishers; academic authors; intellectual property lawyers and organisations; academic libraries; funding bodies; and those involved in technology transfer; industry; and government) were invited to consider 'an IP free world in higher education'. The purpose was to reflect about how a system might develop if starting from scratch. A fascinating dialogue took place over the course of two days, during which delegates were invited to swap roles to consider different points of view. Much discussion revolved around the open access debate, which at the time was highly topical. Although no firm consensus was attained (none was sought), the majority of delegates left with a deeper understanding of the values held by others.¹⁰⁷

¹⁰⁵ For examples in the database area, see 'Access to Databases: Principles for science in the internet era,' prepared by the ICSU/CODATA Ad Hoc Group on Data and Information available at www.codata.org/data_access/principles.html. Principles include: 'Science is an investment in the public interest; Scientific advances rely on full and open access to data; A market model for access to data is unsuitable for research and education; Publication of data is essential to scientific research and the dissemination of knowledge; The interests of database owners must be balanced with society's need for open exchange of ideas; Legislators should take into account the impact intellectual property laws may have on research and education'. Each principle is accompanied by an explanatory text.

¹⁰⁶ The Declaration can be found at www.cptech.org/ip/wipo/genevadeclaration.html

¹⁰⁷ Had we closeted our partners for a week, we might have a new system! An edited note of the meeting can be found at www.law.ed.ac.uk/ahrb/publications/online/ipfreeworld.doc.

These examples illustrate that it is possible to engage in debates over values and that there is value in engaging in the debate. However, to the observer it would appear that these possibilities are not (yet) being heeded by legislators. Expansive property rights are continually pursued that few (but the most interested) seem to want¹⁰⁸, only to be followed by corrective checks implemented by those same legislative representatives when exercise of those same property rights appear one sided. These are complemented by endless public consultations, mostly reactive and too targeted to deal with the prior value issues.¹⁰⁹ One grass roots response to this has of course been the emergence of alternative systems within the framework – of which the open access movement is an example. But as these alternative mechanisms develop, is there a danger that the whole system will get even more out of balance? One response from the intellectual property maximalists might be that the very existence of these alternative methods means that property rights can expand. Anyone who wants to join an alternative movement can do so. But that of course is unrealistic. The majority of these movements pit those in favour of the property right against those who would defend the spaces: the effort required is extraordinary and the result in danger of becoming ever more confused.

7. Conclusion and a new start?

It seems that if we are to try and engage the public in a discussion on the values that should be expressed in the intellectual property system, and most particularly as to what

¹⁰⁸ See the discussion on the proposal for the Directive on the patentability of computer software above. Note also the discussions in WIPO relating to a proposed broadcasting treaty: Second Revised consolidated text for a Treaty on the protection of Broadcasting Organisations, available on the WIPO website paper SCCR/12/2 Rev.2. May, 2005, and the controversy it has spawned (e.g. Naughton, J. 'A law unto themselves', *The Guardian* Sunday June 13 (2004)).

¹⁰⁹ Note the Gowers Review of Intellectual Property which states in part: 'While it has been suggested that the present UK system strikes broadly the right balance between consumers and rights-holders, it also appears that there are a variety of practical issues with the existing framework. The Review will look at both the instruments (patents, copyright, designs etc.) that are provided by government to protect creative endeavour, and also at the operations: how IP is awarded, how it is licensed in the market, and how it is enforced. The Review will examine whether improvements could be made and, as appropriate, make targeted and practical policy recommendations.'

it is that is valued in the intellectual spaces in the system, then the categorisations of *res communes*, *res publicae*, *res universitatis* and *res iuris divinis* are a good starting point. Drawing on historical experience, these categories are at least in part populated by ideas and values which can be understood and thus debated by the interested public. It goes without saying that they need to be elaborated upon as the debate matures. However there is one caveat. By remaining with Latin maxims to hold the values together, are we likely to exclude sections of potentially interested public by being seen as elitist and exclusionary; fencing the debate from those who might be interested, and corralling only those who share some form of understanding as to what they think these terms actually mean? Populist appeal may be anathema to some, and however populist not everyone will engage, but the attempt should at least be made. Naming perhaps contributes a good deal to the engagement of the public with other initiatives in recent years. ‘Access to medicines’ might be one example; ‘creative commons’ another. The challenge is to find words that would express the values encompassed by *res communes*, *res publicae*, *res iuris divini* and *res universitatis* through which the public can be engaged, by virtue of which intellectual spaces can represent what is valued, and the result of which can have real impact in setting policy priorities.